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Supreme Court, U.S.
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No. 08-546

IN THE
Supreme Court of the United States

BLUEPORT COMPANY LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Blueport LLC ("Blueport") hereby submits its Brief in Reply to the Brief of the United States in Opposition.

ARGUMENT

The Opposition highlights the need to review the court of appeals' decision placing the burden on the plaintiff to disprove negative jurisdictional statements and the court of appeals' construction of the first proviso of Section 1498(b).

To the argument that several circuit courts of appeals treat similar jurisdictional negatives under the Federal Tort Claims Act, 28 U.S.C. § 2680(a), as the government's burden, the Opposition merely contends (Opp. 6-7) that it is without merit because that is a different statute. The Opposition fails to address the clear problem that currently between the circuit courts of appeals there is a split regarding how to treat negative jurisdictional limitations — as the government's burden, the Federal Circuit, or the plaintiff's burden, Ninth, Eleventh, Sixth, Seventh Circuits. *See* Petition at 14-18.

To the argument that the Court of Federal Claims, the lower court in this case, has itself treated the nearly identical language in the same section, 1498(c), as the government's burden rather than the plaintiff's, *see Zoltek Corp. v. United States*, 51 Fed. Cl. 829 (2002), the Opposition merely contends that because *Zoltek* was decided by a lower court, there is thus no conflict. (Opp. 7). This again evades the issue that the current state of the law on the topic is a tangled and conflicting mish mash that provides a plaintiff no certainty in advance.

To the argument that the holding below conflicts with the legislative history and intent of Section 1498(b), the Opposition merely contends (Opp. 8) that because the court of appeals relied on the "text and structure" of the section, the legislative history has no import. Again, the Opposition evades the point that the ruling does in fact conflict with the legislative history. *See* Petition at 20-21.

To the argument that the Federal Circuit erred by not requiring a nexus between the acts alleged to infringe and the acts alleged to constitute a position to influence under the first proviso of Section 1498(b), the Opposition does not disagree that Federal Circuit did not require that nexus, but instead argues (Opp. 10) that a nexus requirement is contrary to the prevailing law. But the issue of nexus is a question of constitutional fairness. *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 326, 112 S. Ct. 1904 (1992) (White, J., concurring and dissenting) ("the issue of 'nexus' is really a due process fairness inquiry").

Notably, such a nexus has been required before regarding Section 1498. *See Matter of Government Acquisition of License to Employee's Invention*, B-199,026, 60 Comp. Gen. 248, 1981 WL 22453 (Comp. Gen. Feb. 11, 1981) ("*Comptroller Decision*"). In response to the *Comptroller Decision*, the Opposition merely states (Opp. 10 n. 2) that the decision is irrelevant because it deals with the purchase of an employee's invention, rather than infringement. This is a distinction without a difference. In *Comptroller Decision*, just like the present case, the government wanted to use the invention without payment. The Comptroller rejected

the argument that section 1498(a) permitted the government to take a royalty-free license simply because an employee was in a position to order, influence or induce when there was clearly no nexus between the position of influence and the government's decision to use the employee conception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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